

REMARKS

Claims 1-25, as amended, and new claim 26 are pending for the Examiner's review and consideration. Independent claims 1, 7, and 10 have been amended to clarify that the bars of the invention are placed in the baking container without touching any sides of the container, and expand during baking to contact one or more sides of the container (*See, e.g.*, Specification at page 4, lines 15-18 and page 7, lines 1-7). Several other claims have been amended accordingly. Claim 24 has been amended to recite a preferred margin of about 1 cm to 6 cm between the dough bar and the baking container (*Id.*). New claim 26 recites that the dough bar approximately doubles in size during baking (*Id.*). No new matter is believed to have been introduced by any of the amendments herein, such that entry of the claims is warranted at this time.

Claims 1-3 were rejected under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 6,551,640 to Drantch et al. ("Drantch") for the reasons set forth on pages 2-3 of the Office Action. Drantch is stated to disclose a dough and a method of making fresh baked products from the dough. The Office Action concedes, however, that Drantch does not disclose providing the dough in the form of a bar, as recited in claim 1. Drantch also does not disclose the shape and sizes recited in claims 2-3. Rather the Patent Office takes the position that Drantch does not require any manipulation before baking and that the type of dough, size, and shape of a dough are all simply obvious or a matter of preference.

On the contrary, Drantch is directed to a shelf-stable dough for baked goods wherein fat-bearing pieces that are dispersible within the dough, such as chocolate chips, resist softening by depression of melting point within the dough (Col. 1, lines 6-9). Drantch is primarily concerned with the interaction between chocolate chips in a cookie dough or other type of dough, and the various fats in the dough (Col. 2, lines 40-43). Drantch does generally disclose—in part—that the "doughs are conveniently prepared into finished baked goods by simple addition to a suitable baking container or pan and baking to form a finished baked good" (Col. 11, lines 21-25).

The claims now more clearly and distinctly recite that the dough bars of the present invention are (a) bars; (b) sized to provide a margin between the dough bar and the walls of the baking pan; and (c) dough bars that are sized flow to fill the bottom of a baking pan, neither of which is disclosed or remotely suggested by Drantch. In the Drantch embodiment

where the doughs are preformed, they are fitted to the specific baking container (*Id.* and Col. 12, lines 7-8). Thus, if Drantch is allegedly teaching dough products that do not require manipulation, which Applicants believe may be a hindsight misreading the teaching of Drantch, then even that fails to disclose or suggest the claimed dough bars, as well as doughs that provide a margin between the dough and the baking pan. Moreover, Drantch simply fails to suggest that the dough flows to expand to fill the bottom of the baking pan during baking, as presently recited.

On the other hand, this language in Drantch must be taken in the context of the teaching of Drantch *as a whole*, which teaches that “the edible doughs can be held and *shaped* by hand without the dough sticking to hands or fingers. The edible doughs are usable as edible clay by children” (Col. 6, lines 59-62). This refers to the “dry mix” type of doughs taught by Drantch, as clearly the “batter” dough is too runny and pourable (Col. 4, lines 52-60) to possibly retain its shape, as presently recited. Indeed, as discussed above, where Drantch teaches that the doughs should be *performed in a baking tray specific to the desired type of final baked product* (Col. 12, lines 6-8), in the context of shaping the doughs it teaches that the dough must be manipulated or shaped by hand as noted above. Contrary to the Office Action, which states on page 2 that “[t]here is no disclosure of forming or shaping,” Drantch as a whole clearly and expressly teaches forming or shaping *by hand* and expressly includes at least two passages discussing such forming or shaping as discussed above. Indeed, claims 5 and 6 of Drantch also state that the dough is shaped before addition to the container (as in the “preforming” embodiment noted above where the container must match the shape or the dough will not retain its shape as presently recited) or it is shaped after removal from the container (*e.g.*, with manipulation of the dough). Of course, if the Patent Office continues to maintain that the preformed embodiment of Drantch is not dough manipulated by hand, then Drantch fails to teach that these preformed doughs are sized to leave a margin in the baking pan and fails to teach that they flow during baking to fill the bottom of the baking pan. Of course, even then Drantch doesn’t even teach a dough bar. Contrary to the bald assertion in the Office Action, the claimed invention is not a mere matter of choice in selecting a particular dough, size, and/or shape for a dough bar. Rather, when combined these inventive features provide a convenient, ready-to-bake dough bar that does not require manipulation, that leaves a margin in the baking pan to help

ensure proper cooking with a minimum of scorching, and that flows to fill the baking pan during baking.

But claim 1 already recites that the bars of the present invention retain their shape without breaking until being placed in a tray for baking, *i.e.*, before it is placed in the baking tray, and that this is done without manipulation of the dough. Therefore, Drantch cannot teach the presently recited invention when considering either its dry mix embodiment or its batter embodiment.

Moreover, Drantch relates mainly to the preparation and baking of cookies and ready-to-bake cookie doughs (Col. 3, lines 26-33). Cookies are generally prepared by spooning and dropping small portions of cookie dough onto a baking sheet, at suitable distance from one another, and then baking to form individual-sized, distinct cookies (*See, e.g.*, the Declaration of Merrie Martin at ¶ 7, Under 37 C.F.R. § 1.132 ("the Martin Declaration") submitted previously). One of ordinary skill in the art would therefore have had no motivation to form the cookie dough of Drantch into a solid, monolithic bar (*Id.*). In the other embodiment of Drantch, the doughs are preformed to the desired shape of the final product, such that they do not retain their shape on their own, as presently recited. Rather, those products are preformed in a baking tray shaped the same as the final products desired. Moreover, it is well known that baking a large block of cookie dough would not have provided the desired dual texture of crispness on the outer edges and chewiness in the center that is typically desired for cookies, such as taught by Drantch (*Id.*). Drantch therefore did not provide one of ordinary skill in the art with a reasonable expectation of success in using its dough in the form of a bar (*Id.*).

In the obviousness context, a motivation must have existed for one of ordinary skill in the art to combine the references--and this lack of such a motivation in the art of record demonstrates the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office. *In re Lee*, 277 F.3d 1338, 61 U.S.P.Q.2d 1430 (Fed. Cir., 2002) (finding that the Board of Patent Appeals and Interferences improperly relied upon common knowledge and common sense of person of ordinary skill in art to find invention of patent application obvious over combination of two prior art references, since factual question of motivation to select and combine references could not be resolved on subjective belief and unknown authority). Absent the motivation to provide bars as presently recited, one of ordinary skill in the art would not have formed the cookie dough of

Drantch into a solid, monolithic bar that retained its shape without breaking until being placed in a baking tray.

Even if a *prima facie* case of obviousness had been made on the record, however, one of ordinary skill in the art would have readily understood that, if the dough of Drantch was not flowable or pourable, additional manipulation or other measures, such as spooning, shaping, dropping, and spacing the dough onto to the baking pan is required to achieve a dough product that is ready to be baked (Martin Declaration, ¶¶ 6-7). This is particularly clear when reviewing Drantch as a whole, because Drantch clearly discloses that its "edible doughs can be held and shaped by hand" (Col. 6, lines 60-61) and it clearly discloses that the dough must be *performed in a baking tray specific to the desired type of final baked product* (Col. 12, lines 5-7). Thus, Drantch clearly teaches that efforts are required to shape its dough into desired shapes, using desired amounts, and then placed into a desired position on the baking tray being used for the desired type of baked product (Martin Declaration, ¶ 6). At best, the passage noted in the Office Action about "simple placement" requires pre-shaping of the dough and retention in a container specific to the desired type of final baked product, while a bar prepared according to the claimed process retains its shape until placement—without dough manipulation. Alternatively, the passage provides a dough that fills the container—because Drantch specifically teaches that the preformed dough products are specific to the desired type of final baked product and therefore will be in the size and shape to fit the baking container. Drantch fails to remotely suggest a margin or a flowable dough, as presently recited.

Moreover, Applicants submit herewith a Second Declaration of Merrie Martin Under 37 C.F.R. § 1.132 ("Second Martin Declaration") to further show that the invention is patentably distinct from the cited prior art, taken individually or in combination. As discussed herein, Drantch fails to teach the claimed features of a dough bar that has a margin from the baking pan and that flows to expand and fill the bottom of the baking pan during baking (Second Martin Declaration at ¶¶ 6-7 and 10). Thus, Applicants respectfully submit that the rejection of claims 1-3 under 35 U.S.C. § 103(a) should be reconsidered and withdrawn because no *prima facie* case has been stated on the record—or if it has it has been overcome by the Second Martin Declaration.

Claims 4-18 and 24-25 were rejected under 35 U.S.C. § 103(a) as being obvious over Drantch in view of U.S. Patent No. 4,873,098 to Banks et al. ("Banks") on pages 3-4 of the

Office Action. Banks is stated to teach a cold water swelling granular starch material with a cold water solubility of at least 50%.

Banks fails to remedy the deficiencies of Drantch. It also teaches away by suggesting that manipulation of the cookie dough is required using conventional equipment or techniques. Moreover, Banks fails to even teach dough bar products—it teaches cookies that are typically round and thinner than the claimed dough bars (*See, e.g.*, claims 7 and 12). Applicants fail to see the relevance of Banks other than for its teaching that cold water swelling granular starch can help control the spread of its cookies. The Patent Office, however, cannot pick and choose features from disparate references using the claimed invention as a template as this results in an improper hindsight rejection (*See, e.g., In re Lee, supra*). Relying on Banks makes it clear that even the combination of cited art does not suggest the claimed invention.

Importantly, the doughs enabled by Drantch in its examples are different than the dough recited in claims 7 and 10, as well as dependent claims 4-5. Independent claims 7 and 10, and claim 4, each recites that starch is present but the starch is less than 3% by weight of cold swelling starch based on the weight of the dough, which cannot be taught by Drantch in that it only includes starch as a minor component in its sugar (Col. 7, lines 44-46) but does not teach the separate inclusion or use of starch. Drantch fails to teach the benefits to its dough composition of including a particular type of starch. In fact, Banks appears to teach away from Drantch by teaching much higher amounts of starch. Simply pointing out another reference that includes a higher amount of this type of starch, *i.e.*, Banks, would also not have created a reasonable expectation of success in obtaining the claimed dough bar products and methods because those of ordinary skill in the art would not have known which other features of Drantch or Banks to pick and choose. Moreover, Banks specifically teaches to limit the flow of the dough, which teaches to prevent the dough from flowing to fill the bottom of the baking pan as presently recited (*See* Second Martin Declaration at ¶ 8).

Thus, even in improper combination with Banks, Drantch and Banks still fail to disclose or suggest various important features of the claimed dough, as recited in claims 7 and 14 in particular, as well as other claims in part. In particular, Drantch fails to teach: (a) the amount of flour; (b) an emulsifier present in specifically recited amounts; (c) egg, egg white or an egg substitute in an amount of 9% to about 15%; and (d) the addition of excess water; each of which is recited in claims 7 and 14, as well as one or more being recited in other claims as well. While

the modification of one or even two of these may be construed as “mere optimization,” it should be apparent that the combination of all these differences recited in claims 7 and 14 provides the surprising and unexpectedly different dough of one embodiment of the invention. Even assuming a motivation to combine Banks and Drantch existed, which it did not, the combination also fails to teach the (a) margins and (b) flowability of dough to fill the bottom of the container during baking, as presently recited in independent claims 7 and 10 (*See* Second Martin Declaration at ¶ 10). Accordingly, Applicants respectfully request that the rejection of claims 4-18 and 24-25 under 35 U.S.C.

§ 103(a) be reconsidered and withdrawn, as no *prima facie* case of obviousness has been shown on the record--particularly in view of the Martin Declarations.

Claims 19-23 were rejected under 35 U.S.C. § 103(a) as obvious over Drantch, Banks, and International Publication No. WO 01/06858 to Blaschke et al. (“Blaschke”) for the reasons set forth on page 4 of the Office Action, which simply states that Blaschke teaches doughs that are firm during storage and flow during baking and that different doughs can be used depending on the desired taste, texture, flavor, and look. Applicants respectfully traverse.

Initially, this rejection applies only to dependent claims that have already been shown to be patentably distinct as discussed above. Moreover, Blaschke teaches directly away from the other cited references and from the claimed invention in that it requires a sheet with score lines defining pieces of dough that are broken off to form individual brownies or other dough products that are then baked. Not only does the present invention recite that no groove or score lines are included on the dough bars of the present invention, but the claimed invention teaches exactly the opposite of Blaschke—that a single monolithic dough bar is placed in a baking pan for baking rather than having the need to manipulate the dough by separating pieces off and pacing them separately in a baking pan. Thus, this rejection illustrates the hindsight nature of the present rejection in using the present invention as a template when in fact the claimed invention is completely contrary to the inventive concepts in Blaschke. In fact, the presently recited invention excludes such grooves or score lines to more clearly and distinctly recite the claimed invention. Applicants also point to the Martin Declaration at ¶ 8 and the Second Martin Declaration at ¶ 9 regarding these teachings of Blaschke and the lack of motivation and lack of expectations of ordinary skill in the art obtained from that reference, *i.e.*, to break pieces of the block apart along grooves or scores before baking rather than

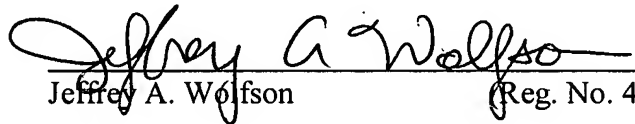
providing a dough bar that is placed without manipulation to advantageously provide a dough bar product with a minimum of consumer effort. Nothing in Blaschke suggests or remotely motivates one of ordinary skill in the art to bake an entire block of dough (*Id.*). Accordingly, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, as no *prima facie* case of obviousness has been shown on the record--particularly in view of the Martin Declaration and Second Martin Declaration.

Accordingly, the entire application is now in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree with the Applicants' position, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

Respectfully submitted,

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Date



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